

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHANNON ASSOCIATES LLC and
MJW/RAC, LP,

Petitioners,

v.

EDWARD MACKAY and DORIAN MACKAY,

Respondents.

No. C 09-4184 CW

ORDER DENYING
RESPONDENTS' MOTIONS
TO DISMISS PETITION
TO CONFIRM
ARBITRATION AWARD
AND TO REMAND
PETITION TO CORRECT
OR TO ABSTAIN
(Docket No. 9; Case
No. 09-4736, Docket
No. 5)

Respondents Edward Mackay and Dorian Mackay move to dismiss for lack of subject matter jurisdiction the petition, filed by Shannon Associates LLC and MJW/RAC, LP, to confirm an arbitration award. In addition, Respondents move the Court to remand to San Francisco Superior Court their petition to correct the arbitration award or, in the alternative, to abstain. Petitioners oppose the motions. The motion was taken under submission on the papers. Having considered all the papers submitted by the parties, the Court DENIES Respondents' Motion to Dismiss (Docket No. 9) and Motion to Remand (Case No. 09-4736, Docket No. 5).

BACKGROUND

Respondents, California residents, were removed from their positions as general partners of Hollister Investment Group I

1 because, according to Petitioners, they breached their fiduciary
2 duty to the partnership. Petitioner Shannon Associates, an Oregon
3 limited liability company, took Respondents' place as general
4 partner. Shannon and Petitioner MJW/RAC, an Oregon limited
5 partnership, sought to purchase Respondents' partnership interest
6 in Hollister. The controlling partnership agreement defined the
7 purchase price as the fair market value less any damages suffered
8 by the partnership as a result of the material breach of
9 Respondents' partnership obligations. Because the parties were
10 unable to agree on a purchase price, the dispute went to
11 arbitration, as required by the partnership agreement.

12 A three-member arbitration panel found that the fair market
13 value of Respondents' interest was \$267,000, which was offset by
14 \$260,000 for the damages caused by Respondents' breach. Thus, the
15 resulting purchase price was \$7,000. The panel also required
16 Respondents to pay Petitioners \$50,676.98, which was seventy-five
17 percent of the arbitration's cost.

18 On September 10, 2009, Petitioners filed a petition to confirm
19 the arbitration award pursuant to the Federal Arbitration Act, 9
20 U.S.C. §§ 9 and 10. The same day, Respondents filed a petition in
21 San Francisco County Superior Court to correct the arbitration
22 award. Respondents sought to correct the award by "striking the
23 offset for damages" and requested that the award be confirmed as
24 corrected. Respondents' Request for Judicial Notice (RJN),¹ Ex. A
25 at 3. In the petition, Respondents indicate that the amount in

26
27 ¹ The Court grants Respondents' Request for Judicial Notice.
28 The documents of which Respondents seek judicial notice contain
facts that are not subject to reasonable dispute. Fed. R. Evid.
201.

1 dispute is \$260,000. RJN, Ex. A at 2. Petitioners removed that
2 petition to this Court. The Court then consolidated it with
3 Shannon and MJW/RAC's petition.

4 LEGAL STANDARD

5 Subject matter jurisdiction is a threshold issue which goes to
6 the power of the court to hear the case. Federal subject matter
7 jurisdiction must exist at the time the action is commenced.
8 Morongu Band of Mission Indians v. Cal. State Bd. of Equalization,
9 858 F.2d 1376, 1380 (9th Cir. 1988). A federal court is presumed
10 to lack subject matter jurisdiction until the contrary
11 affirmatively appears. Stock W., Inc. v. Confederated Tribes, 873
12 F.2d 1221, 1225 (9th Cir. 1989).

13 Dismissal is appropriate under Rule 12(b)(1) when the district
14 court lacks subject matter jurisdiction over the claim. Fed. R.
15 Civ. P. 12(b)(1). A Rule 12(b)(1) motion may either attack the
16 sufficiency of the pleadings to establish federal jurisdiction, or
17 allege an actual lack of jurisdiction which exists despite the
18 formal sufficiency of the complaint. Thornhill Publ'g Co. v. Gen.
19 Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v.
20 Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987).

21 DISCUSSION

22 Petitioners assert that both petitions are subject to the
23 Court's diversity jurisdiction. See 28 U.S.C. § 1332. Respondents
24 do not dispute diversity of citizenship, but instead argue that the
25 amount in controversy does not meet the \$75,000 jurisdictional
26 amount. Id. § 1332(a).

27 In Theis Research, Inc. v. Brown & Bain, the Ninth Circuit
28 held that the measure of the amount of controversy in arbitration

award cases is "the amount at stake in the underlying litigation, not the amount of the arbitration award." 400 F.3d 659, 662 (9th Cir. 2005). In that case, the plaintiff contemporaneously filed in federal court a motion to vacate an arbitration award of zero dollars and a complaint seeking damages in excess of \$200 million. Id. at 661. Subsequently, the defendant moved to confirm the arbitration award. Id. at 662. The court granted the defendant's motion to confirm and, thereafter, granted summary judgment in favor of the defendant on all of the plaintiff's claims. Id. On appeal, the plaintiff argued, citing the arbitration award, that the district court lacked diversity jurisdiction over the action because the amount in controversy requirement was not met. The court of appeals disagreed and held that district court had jurisdiction because the complaint's request for damages was the appropriate measure for the jurisdictional amount. In reaching its conclusion, the court found support in decisions by other circuits where parties "seeking to vacate an arbitration award also sought to reopen the arbitration." Id. at 664. In those cases, the courts measured the jurisdictional amount based on the amount at stake in the underlying litigation, not the arbitration award. See, e.g., Sirotevsky v. New York Stock Exch., 347 F.3d 985, 989 (7th Cir. 2003) ("[T]he amount in controversy in a suit challenging an arbitration award includes the matter at stake in the arbitration, provided the plaintiff is seeking to reopen the arbitration."). The court acknowledged that Theis did not seek to reopen the arbitration hearing, but viewed Theis' complaint to seek the functionally same result. "Theis sought to obtain by its district court complaint substantially what it had sought to obtain in the

1 arbitration." Id. at 665.

2 The Theis court noted that its decision comported with cases
3 that used the arbitration award to measure the amount in
4 controversy. It explained that, in these cases, the plaintiffs
5 "simply sought to vacate" arbitration awards. Id. at 665
6 (discussing Ford v. Hamilton Investments, Inc., 29 F.3d 255 (6th
7 Cir. 1994)). Because there were no other claims before those
8 courts, the amount in controversy was the arbitration award.

9 Here, Shannon and MJW/RAC's petition to confirm the \$7,000
10 arbitration award does not satisfy the requisite amount for
11 diversity jurisdiction. However, by asking a court to strike the
12 \$260,000 offset for damages, Respondents' petition to correct seeks
13 relief far in excess of the \$75,000 required under § 1332(a). As
14 noted above, Respondents admit in their petition that the disputed
15 amount is \$260,000. Based on its jurisdiction over Respondents'
16 Petition to Correct, the Court properly asserts supplemental
17 jurisdiction over Petitioners' Petition to Confirm.²

18 Respondents argue that they have not asked to reopen the
19 arbitration but merely seek a correction that would strike the
20 arbitration panel's damages offset. Thus, Respondents assert,
21 Theis requires the Court to look only to the \$7,000 arbitration
22 award. This argument is disingenuous. Respondents' correction
23 request would restore \$260,000 to the arbitration award in their
24 favor. As in Theis, although Respondents do not explicitly seek to
25 reopen arbitration proceedings, the relief they request would give
26

27 ² Shannon and MJW/RAC's petition to confirm now constitutes a
28 counterclaim to Respondents' petition, which was properly removed
to this Court.

1 them what they sought at the arbitration hearing. And unlike the
2 cases in which the arbitration award constituted the amount in
3 controversy, Respondents are not simply seeking a vacatur of the
4 \$7,000 arbitration award.

5 Goodman v. CIBC Oppenheimer & Co., 131 F. Supp. 2d 1180 (C.D.
6 Cal. 2001), which was decided before Theis, does not support
7 Respondents' position. There, the court dismissed a petitioner's
8 petition to vacate an arbitration award of \$74,030.75 for lack of
9 subject matter jurisdiction. Id. at 1184. The court held that the
10 amount in controversy in the petition to vacate (i.e., the
11 arbitration award), not the initial demand in the underlying
12 arbitration, was the appropriate measure for the purposes of
13 diversity jurisdiction. Id. Here, the Court relies on the
14 disputed amount in Respondents' Petition to Correct. Even under
15 Goodman, the jurisdictional amount is met.

16 Thus, the amount at stake in Respondents' correction petition,
17 not the arbitration award amount, constitutes the amount in
18 controversy. The Court therefore has diversity jurisdiction over
19 Respondents' Petition to Correct the Contractual Arbitration Award.
20 The Court finds no reason to abstain from deciding this action.
21 Pursuant to 28 U.S.C. § 1367, the Court exercises supplemental
22 jurisdiction over Shannon and MJW/RAC's Petition to Confirm.

23 CONCLUSION

24 For the foregoing reasons, the Court DENIES Respondents'
25 Motion to Dismiss (Case No. 09-4184, Docket No. 9) and their Motion
26 to Remand or to Abstain (Case No. 09-4736, Docket No. 5).
27 Respondents' request for attorneys' fees is DENIED. The case
28 management conference scheduled for December 22, 2009 at 2:00 p.m.

1 is vacated. Instead, Petitioners shall file a motion to confirm
2 the arbitration award on January 5, 2010. Respondents shall file,
3 in a single brief of no more than twenty-five pages, an opposition
4 to this motion and a cross-motion to correct the arbitration award
5 on February 2, 2010. Petitioners may file a fifteen-page reply to
6 the motion and opposition to the cross-motion on February 16, 2010.
7 Respondents may file a fifteen-page reply to the cross motion on
8 March 2, 2010. The matter will be decided on the papers.

9 IT IS SO ORDERED.

10
11 Dated: December 8, 2009



CLAUDIA WILKEN
United States District Judge